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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No.

PORT GIBSON VENEER & BOX COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdictional Statement.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) and Sub-Section 8(a) of the Judicial Code, as amended, 28 U. S. C. A., Sections 347 and 350, and Supreme Court Rule 38, 5(b).

Summary Statement of Matters Involved.

Petitioner, Port Gibson Veneer & Box Company (hereinafter called Petitioner), by its counsel, prays that a writ of certiorari issue to review the decision (see Appendix B) of the United States Circuit Court of Appeals for the Fifth Circuit, rendered April 9, 1948, and reported in 167 Fed. 2d 144, enforcing an order of the National Labor Relations Board rendered on August 26, 1946 (70 N. L. R. B. 319; see Appendix A), ordering petitioner to cease and desist from certain alleged unfair labor practices, to make whole employees assertedly discriminated against, and to post appropriate notices to its employees that their rights under the National Labor Relations Act would not be further violated. 49 Stat. 449, 29 U. S. C. A. §151 et seq.; Labor-Management Relations Act, 1947 Pub. Law No. 101, 80th Cong., 1st Sess., Chap. 120, 29 U. S. C. A. §141 et seq.

The petitioner is a Mississippi Corporation engaged at Port Gibson, Mississippi, in the manufacture of wooden boxes and containers used to package and ship frozen poultry, fresh fruits, and vegetables. It is admittedly engaged in commerce within the meaning of the Act.

The International Woodworkers of America, C. I. O., began its organizational efforts among the employees of Petitioner in August 1944. On September 25, 1944, the Union requested the Petitioner to recognize it as the exclusive bargaining agent of its employees. This request

Petitioner on September 30, 1944, refused "until such time as the Union could prove its claim to a majority". (R. 64.)[1]

In a representation proceeding instituted by the Union on or about October 6, 1944, the Board ordered that a hearing be held on or about October 27, 1944. At said hearing it developed that the Union had cards signed by 127 out of 299 employees (R. A. 3. See report in Case No. 15-R-1241, 59 N. L. R. B. 270.) The Board issued its order for an election to be held on November 22, 1944.

In 1941, when Petitioner began its operations, it required all of its employees to undergo a physical examination and to fill out and sign an application form, sometimes referred to hereinafter as a "contract". This form had been in use by Petitioner's predecessor since 1937 and was originally copied from a form used by the Illinois Central Railroad Company (R. 64; R. A. 157). A copy of this form is filed herewith as Appendix "C". This application form was used principally as a health precaution and safety measure (R. 65). The National Labor Relations Board found that "the provisions of the proposed contract . . . were not in derogation of the Act, nor did execution of such a contract preclude future collective bargaining." (R. 51.)

This application form had been used by Petitioner in 1941, and all of the production employees had at that time signed the application without objection, but its use was

[1] References to the "Transcript of Record" are designated by "R". References to portions of the testimony and documentary exhibits printed as an Appendix to the Board's brief are designated by "B. A." References to portions of the testimony printed as an Appendix to the Petitioner's brief are designated by "R. A."

discontinued during the War because of the rapid turnover of personnel and the scarcity of doctors to examine the employees. In the meantime, the heavy turnover of employees resulted in leaving only a small number of employees in the plant who had originally signed the applications.

In July, 1944, Petitioner encountered certain difficulty in respect to obtaining records on its employees and decided to renew the requirement for the execution of application blanks. The printing of a new supply of blanks delayed the execution thereof, and the employees did not begin signing such blanks until October 2, 1944. Between October 2, 1944 and October 22, 1944, 45 out of about 300 production employees signed the application blanks. Petitioner's president, Alex Wilson, complained to the local manager about the slowness in obtaining the signatures, and on October 16, 1944, called a conference in Petitioner's office, at which conference there were two employees chosen at random from each department of Petitioner's plant (R. 67). The purpose of this conference was to ascertain the employees' reasons for refusing to execute the applications. Howard Thomas, the Union organizer, testified that he had advised the employees against signing the application without first consulting an attorney. However, this advice had not been communicated to the Petitioner nor anyone representing Petitioner (R. A. 2).

Although Petitioner's president insisted that the employees advise him of their reason for not signing the application, no one mentioned the Union in the conference, but the only reasons assigned related to the effect of the contract upon the right of an employee to recover in the

event of an injury. The objection appeared to be primarily to the clause that the employees "assume all the risks and dangers incident" to their employment (R. 67, 68, 69). Petitioner pointed out that this was merely the law anyway and that there was nothing wrong with the contract, but that it was a reasonable regulation of the company, and advised the employees that they must abide by the regulations of the company. Instructions were given to the supervisors to require all of the employees to sign the application blanks by October 23, 1944.

On Monday, October 23, 1944, at 8:00 o'clock a. m. when the day shift employees reported to work, the foremen met them at the plant entrance and admitted only such employees as had signed applications. A total of 65 employees worked during the week beginning October 23rd. The other employees declined to sign the application blank and remained away from work.

Alex Wilson, the Petitioner's President, renewed his inquiry when he saw that the employees chose to remain away from work rather than sign the application and finally received the information that it was upon the advice of the Union that the employees were thus acting in concert. Wilson at about the same time learned the names of the Union officers and sent for the president, vice-president and secretary-treasurer but only succeeded in locating the president of the Union. Wilson immediately advised the president of the Union that Petitioner would waive all requests and demands for applications pending the Union organization and requested the president of the Union to have the employees return to work.

This request occurred on Thursday, October 26, 1944, but the employees did not return to work. On Saturday, October 28th, when the employees reported to obtain their pay, Petitioner's president made a speech in which he advised all of the employees that the Petitioner had no objection to the formation of a Union and asked again that all of the employees return to work. Most of the employees complied with this request and resumed work on Monday, October 30, 1944 (R. 71, 72).

Thus, the employees chose on October 23, 1944, to remain away from work in preference to signing the application form; when Petitioner abandoned the requirement four days later the employees still refused to return to work, and while most of the employees agreed to return on October 30, 1944, after Petitioner's president on October 28th made a second appeal to them, some did not go back to work for several days after that (Pet. Rehearing pp. 3-4).

A complaint was filed by the Labor Board on or about November 9, 1945, alleging that Petitioner "did, on or about October 23, 1944, lay off, constructively discharge, lock out, and fail and refuse to provide work for all of its employees and did until on or after October 30, 1944, refuse and fail to employ them, and each of them for the reason that they, and certain of its employees, joined and assisted the Union and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection." (R. 19, 20.)

Said complaint also set forth certain allegedly discriminatory discharges with respect to nine specifically named employees (R. 20), and at the hearing the name of another employee, Charles Marshall, was added by amendment. Rulings favorable to the Petitioner have been made on all of the charges relating to discriminatory discharges that were prosecuted.

A majority of the Board, however, held that the circumstances relating to the enforcement of Petitioner's regulation that application blanks be executed at a time when the Union was in the process of being organized constituted an unfair labor practice, and the employees who remained away from work rather than comply with such regulation were entitled to recover pay for the four days between the dates of its enforcement and its abandonment by Petitioner.

The Fifth Circuit Court of Appeals has rendered a decision authorizing the enforcement of the Board's order in this respect, and the questions which it is desired to submit to this Court arise therefrom.

Although there were over 200 employees who did not sign the application, the Board used only 10 such employees as witnesses. Of these witnesses, Luther Buie, the president of the Union (B. A. 16), Minnie Jenkins (B. A. 50, 51), Viola Nobles (B. A. 62), Canary Jackson (R. A. 36, 37), and Charlie Strawberry (R. A. 58, 59) testified that the Union had nothing to do with their refusal to sign the applications. Joseph Anderson (B. A. 22), Alice

Carter (B. A. 26), and E. M. Howard (B. A. 66) testified in response to leading questions by the Board's counsel that in their opinion the signing of the applications would have an adverse effect upon the Union. The Board's counsel also asked Sandy Moses a leading question to elicit such an answer, but, upon objection being made and sustained and counsel being cautioned to avoid leading questions, the Board did not pursue the questions further with this witness (R. A. 13); Board's counsel also asked Anna Brown a leading question in respect to said matter and, upon objection being made, withdrew the question (B. A. 48). The Board found "that the employees reasonably believed, although *mistakenly*, that execution of such contracts would have the effect of precluding future collective bargaining." (R. 51. Emphasis supplied.)

At the election held November 22, 1944, less than a month after Petitioner's demand for the execution of the individual contracts, the employees cast 199 votes for the Union and 19 against the Union (R. 64).

Certain incidental circumstances not directly related to the controversy relative to the Petitioner's rule requiring the execution of the application blanks, including a speech of H. J. Wilson, statements of supervisory employees, and alleged surveillance, will be discussed in connection with the argument.

Questions Presented.

1. Whether the concerted action of Petitioner's employees in choosing to remain away from work in preference to signing lawful individual contracts required as a condition of employment, during a Union organizational campaign, but before selection of a bargaining agent, was a strike; and, if so, whether under 29 U. S. C. A. 158(3) Petitioner may be ordered to pay these employees for any part of this strike.

2. Whether Petitioner violated 29 U. S. C. A. 158(1) by demanding as a condition of employment of its employees, before their selection of a bargaining representative, execution of an employment contract which did not preclude future collective bargaining and which in no way violated the Act but which some of the employees, unknown to Petitioner, mistakenly believed would interfere with their rights to bargain collectively through a union.

3. Whether certain statements to employees, attributed to Petitioner, were privileged under the constitutional guaranty of free speech; whether the Act as recently amended expressly protects such statements, and, if so, whether an order of the National Labor Relations Board, operating prospectively, may be made on subject matter under the original statute which has been changed since the alleged violations occurred.

Reasons Relied on For Allowance of Writ.

Reason I. The Circuit Court of Appeals has decided an important question in the administration of the Act which has not been but should be settled by this Court. It is important to determine whether employees who engage in a concerted refusal to work when confronted with the alternative of executing a lawful individual contract may collect wages for the time thus lost. The Circuit Court of Appeals has held that the mistaken belief of some of the employees that this contract precluded future collective bargaining warranted the back pay order. If that holding remains law, as Board Member Reilly indicated in dissenting from the majority in this case, then any strike called on the mistaken belief that management has committed an unfair labor practice may result in assessment of severe and unwarranted penalties in back pay awards and may encourage, by rewarding the participants therein through payment of wages for the periods thereof—as the Board itself has observed in other cases—the use of strikes in lieu of the orderly processes of the Act for remedying unfair labor practices.

Reason II. The decision of the Circuit Court of Appeals erroneously applies the decision of the United States Supreme Court in the case of *J. I. Case Company v. National Labor Relations Board*, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762. Two of the members of the National Labor Relations Board interpreted and applied the *J. I. Case* decision, *supra*, in such a manner as to reach the conclusion that Petitioner's conduct in requiring the execution of an application which did not *per se* violate the Act was

an unfair labor practice. Board Member Reilly's interpretation of the same decision of the United States Supreme Court resulted in exactly the opposite conclusion. The Fifth Circuit Court of Appeals has followed the conclusion reached by the majority of the Board. We submit that the correct interpretation of such decision was that contained in Mr. Reilly's dissenting opinion.

We also submit that the decision of the Fifth Circuit Court is in conflict with *N. L. R. B. v. Sands Manufacturing Co.*, 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, and *Texas & New Orleans Rd. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034.

Reason III. The Fifth Circuit Court of Appeals has rendered a decision upon the questions stated in the preceding paragraphs in conflict with the decisions of other Circuit Courts of Appeals on the same matters. We submit that in principle the decision in this case is in conflict with the decision of the Fourth Circuit Court in the case of *Home Beneficial Life Ins. Co. v. National Labor Relations Board*, 159 F. 2d 280, and of the Seventh Circuit Court in the case of *C. G. Conn, Ltd. v. National Labor Relations Board*, 108 F. 2d 390.

Reason IV. The Circuit Court of Appeals has decided a Federal question in a way conflicting with the applicable decisions of this Court relating to the constitutional guaranty of free speech. *National Labor Relations Board v. Virginia Electric & Power Co.*, 86 L. Ed. 348, 314 U. S. 469. The Circuit Court's decision, also, enforces an order

of the Labor Board which would operate prospectively as to matters protected under the Act, as amended, on the basis of a violation under the original statute. Labor-Management Relations Act, 1947, 29 U. S. C. A. 158(c).

Wherefore, petitioner prays for a writ of certiorari from this Honorable Court directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day therein named, a full and complete transcript of the record and all proceedings in the case of *National Labor Relations Board v. Port Gibson Veneer & Box Company*, No. 12,195 on the docket of said Court, and that said judgment of said Court may be reversed and petitioner afforded appropriate relief.

June ...., 1948.

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Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No.

PORT GIBSON VENEER & BOX COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the National Labor Relations Board is reported in 70 N. L. R. B. 319, and is copied as Appendix "A" to this brief. The opinion of the United States Circuit Court of Appeals is reported as "National Labor Relations Board vs. Port Gibson Veneer & Box Company", 167 Fed. 2d 144, and is printed in the record and made Appendix "B" to this brief.

Basis for Jurisdiction.

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at Page 1 of the foregoing petition and is, by reference, adopted as a part of this brief.

Statutes Involved.

This case involves the construction of the National Labor Relations Act, before amendment in 1947, paragraphs (1) and (3), Section 158, U. S. C. A., Title 29, and, as amended in 1947, by the addition of Section 158 (c), which applicable provisions contain the following language:

> "It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment

membership therein, if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made."

* * * * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Statement.

The material facts have been set forth in the Summary Statement at pages 2, et seq., of the preceding petition, and such statement is, by reference, adopted as part of this brief.

ARGUMENT.

Point I.

The employees for whom back pay has been awarded under the decision of the Circuit Court of Appeals were actually engaged in a strike during the period of their absence from employment, and, therefore, are not entitled to be compensated under 29 U. S. C. A. 158(3) and 160(c) for time lost.

The Labor Board concluded that these employees were discriminated against in regard to hire or tenure of em-

ployment for non-compliance with a lawful condition (that they sign the contracts), illegally imposed (R. 52). In its brief to the Circuit Court of Appeals (p. 30), however, the Board apparently agreed with Petitioner's contention that the employees were on strike, observing that after abandoning the condition of employment (execution of the individual contract) "the Company was making a strong effort to get the employees back to work." Further recognition of this fact was accorded by the Board in its failure to award back pay to the employees during part of their absence from work, i. e., following abandonment of Petitioner's demand for signing the contracts, while allowing it for the fours days during which the requirement remained in effect.

In *Montgomery-Ward Company v. National Labor Relations Board,* 107 F. 2d 555, discrimination was defined as follows:

> "We believe that the term 'discrimination' takes its meaning from the context of Section 8(3), and that it refers to anti-union discrimination, that is, to a different treatment accorded union employees solely because of their union memberships or activities and without reference to whether they hold comparable or noncomparable jobs."

The condition here was not imposed solely upon Union members. It was applied without discrimination and uniformly to all employees, and at a time when the great majority of the employees were not affiliated with the Union. Subsequent to the strike, which may be said to have been won by the Union in view of Petitioner's

abandonment of the condition, the Union overwhelmingly won an election conducted by the Labor Board (R. A. 128-131).

If the demand for execution of the contracts (themselves found to have been lawful) was an unfair labor practice, the employees were not thereby deprived of their rights and remedies. Instead of signing the contracts and pursuing their rights to the remedies permitted by the Act, they elected to strike. This they were not compelled to do, for they were not discharged or laid off and they could have suffered no injury or wrong, if Petitioner's requirement were unlawful, for they could have obtained full redress through the Labor Board. In refusing to work they exercised a right—the right to strike—also given them under the Act, but in so doing they forfeited the wages they otherwise would have earned by remaining at work.

The Labor Board has well stated our position here in its decision in *Matter of Volney Felt Mills, Inc.*, August 26, 1946, 70 NLRB No. 72, 18 LRRM 1422, 1424:

> "In his exceptions and brief, counsel for the Board urges that back pay should be awarded to the respondent's employees who at the time of the hearing were still engaged in the unfair labor practice strike which began on January 24, 1946. We do not agree. To award back pay to such strikers, no matter how flagrant an employer's unfair labor practices might be, would, in our opinion, not only encourage but also place a premium upon resort by employees to industrial strife and the interruption of commerce in order to otain redress of wrongs, rather than pro-

> mote recourse to the orderly administrative process established by the Act. Inasmuch as it is incumbent upon the Board to formulate and adopt such remedies as will effectuate the policies of the Act, we shall adhere to our practice of denying back pay to unfair labor practice strikers under circumstances such as those in this case."

Proof of the fact that the action of the employees, in refusing to work October 23rd when confronted with the condition that they sign the contracts, was concerted action—i. e., a strike—appears from the continued refusal of them all to return to work after the condition was lifted by announcement of Petitioner's president on October 26th, and their reluctant agreement two days later to return the succeeding Monday. The Board and the Circuit Court have not directed Petitioner to pay for those days in that week and in the subsequent period during which the employees remained away from work after removal of the condition; thus it appears to have been held that the employees were not on strike while the condition was effective but were on strike after its abandonment. These inconsistencies appeared also in the Board's other holding, reversed by the Circuit Court, that three employees who unmistakably quit before the deadline for signing the contracts actually were on strike while the other employees who remained away from work after the deadline rather than sign the forms were not on strike (R. 77-78).

Point II.

The National Labor Relations Board and the Circuit Court of Appeals have each misinterpreted the decision of this Court in J. I. Case Company v. National Labor Relations Board, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762.

It is submitted with deference that the dissenting opinion of Board Member Reilly constitutes the correct interpretation of the *J. I. Case Company* decision of this Honorable Court. This Court in the *Case* decision expressly held that it is permissible to enter into individual contracts at a time when a majority of the employees have not authorized a Union to represent them. The contracts in the instant case were not only lawful under the *Case* decision; they contained no provisions which might conflict with the usual collective bargaining agreement. The Board itself found that they did not preclude collective bargaining (R. 51); yet in its order the Board, quite inconsistently again, directed that Petitioner cease giving effect thereto "to forestall collective bargaining" (R. 53), because some of the employees mistakenly believed the contracts would have that result. In the cases relied upon by the Board before the Circuit Court (Br. p. 27) the conditions imposed in the individual contracts were directly or manifestly illegal in and of themselves; and in every case the employer directly discharged the employees for refusal to comply with these illegal conditions. In the instant case no provision of the contract was illegal or in any way interfered with the rights of the employees under the Act. Both the contract itself and Petitioner's demand for its execution were accord-

ingly entirely valid under the decision of the *J. I. Case Company* case.

As there was nothing contained in the contract here that could affect the rights of the employees, Petitioner had no reason to anticipate that interference or coercion would result from a mistaken and erroneous conception of its effect. The employees, equally with management, are presumed to have knowledge of the provisions of the Act. *Midland Steel Products Co. v. National Labor Relations Board,* 113 F. 2d 800, 804. It does not even appear in this case that the mistaken belief was generally entertained among the employees, and even the president of the Union testified that his refusal to sign the contract was in no way connected with the Union. The question here is not whether the contract interfered with other rights of the employees, but whether it interfered with their rights under the Act.

The *Case* decision, the conclusions of the Board and of the Circuit Court that the contracts were lawful, and the result of the election held shortly after the happenings complained of, strongly suggest that Petitioner's demand for execution of the contracts did not amount to interference or a violation of the Act in any respect.

Point III.

Circumstances other than the rule requiring execution of the contracts, and on which the Court in large part grounded portions of its decision, are protected by free speech and recent amendments to the Act.

A speech by the father of Petitioner's president (who was not an official of Petitioner), apparently relied upon by the Board and the Circuit Court in connection with the order in this case, urged the employees to be industrious and put forth their best efforts. It only vaguely referred to the Union, if at all, and indicated doubt as to whether two new machines obtained on priorities would be brought to Port Gibson because of the possibility of unrest there or sent to another plant controlled by the father of Petitioner's president but unconnected with Petitioner (R. 81). Other circumstances on which the order is based include a statement by a supervisor characterizing the Union as a "damn Union", an expression of personal opinion of the county sheriff who was in no way connected to or with Petitioner, and the momentary presence (without more) of an official of Petitioner across the street from a meeting held indoors and at night by the Union. The instances of spoken words, at least, do not exceed the constitutional protection of free speech (*National Labor Relations Board v. Virginia Electric & Power Co.*, 86 L. Ed. 348, 314 U. S. 469), and are specifically exempt from unfair labor practice findings under the Act as amended in 1947 [29 U. S. C. A. 158 (c)]. An order based upon findings valid under the original Act may not operate prospectively, as is sought through the order in-

volved here, if such findings are invalid under a subsequent state of the law.

Respectfully submitted,

June ...., 1948.

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CERTIFICATE.

This is to certify that copies of this petition and brief have been mailed to the Solicitor General of the United States and the National Labor Relations Board on this the .... day of June, 1948.

.....

APPENDIX A.

United States of America.

Before The National Labor Relations Board.

In the Matter of:
Port Gibson Veneer & Box Company and International Woodworkers of America, affiliated with the Congress of Industrial Organizations.

Case No. 15-C-1020.

On January 30, 1946, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto.[1] Thereafter, the respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following exceptions and modifications:

[1] The Trial Examiner also found that the respondent had not discriminated against Charles Marshall, Viola Noble, Canary Jackson, E. M. Howard, and Evan Doss, within the meaning of Section 8 (3) of the Act. Inasmuch as neither counsel for the Board nor the Union filed exceptions to the Trial Examiner's recommendations that the complaint be dismissed as to those employees, we shall adopt such recommendations without setting forth the evidence with respect to their cases.

1. We do not agree with the Trial Examiner that the so-called "contract of employment" which the respondent demanded that each employee sign, was itself violative of the Act. The provisions of the proposed contract themselves, more fully set forth in the Intermediate Report, were not in derogation of the Act nor did execution of such a contract preclude future collective bargaining.[2] However, under all the circumstances, and particularly in view of the timing of the respondent's demand that the employees execute such individual contracts in the midst of the Union's known organizational campaign and in the face of the pendency before the Board of a proceeding looking toward the designation of representatives for the purpose of collective bargaining, and in view of the respondent's resistance to the Union, as set forth in the Intermediate Report, we find that the respondent demanded execution of the individual contracts of employment for the purpose of deterring employees from joining or adhering to the Union and that the demand had such effect upon the employees. By this conduct, the respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) thereof.

2. We find it unnecessary to determine whether the respondent's conduct in refusing to allow the employees to

[2] J. I. Case v. N. L. R. B., 321 U. S. 332. While, as a matter of law, execution of the individual employment contract would not preclude future collective bargaining even during the term of an individual contract, we are of the opinion, as hereinafter in substance found, that the respondent intended to use the individual contracts as a deterrent to future collective bargaining and that the employees reasonably believed, although mistakenly, that execution of such contracts would have the effect of precluding future collective bargaining.

continue at work on October 23, 1944, unless they signed individual contracts of employment, constituted a lockout, as the Trial Examiner characterized the respondent's conduct. We find that by such conduct the respondent discriminated as to hire or tenure of employment, within the meaning of Section 8 (3) and (1) of the Act, because the respondent thereby denied work to the employees as a penalty for noncompliance with a condition promulgated by the respondent for an unlawful purpose.

---

38 ORDER.

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Port Gibson Veneer & Box Company, Port Gibson, Mississippi, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Woodworkers of America, CIO, or any other labor organization of its employees, by discriminating in regard to the hire or tenure of employment or any term or condition of employment of its employees;

(b) Giving effect to the individual contracts of employment described in the Intermediate Report attached hereto, or any modification, continuation, extension, or

renewal thereof, to forestall collective bargaining or to deter self-organization, or entering into any similar form of contract with its employees for any period subsequent to the date hereof for such purpose or with such effect;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Woodworkers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole the employees listed in Appendix A, II, of the Intermediate Report for any loss of pay that they may have suffered as a result of the respondent's discrimination against them, in the manner provided in the section of the Intermediate Report entitled "The Remedy".

(b) Make whole Pearline Brown, Alice Carter, and Annie Brown for any loss of pay that they may have suffered as a result of the respondent's discrimination against them by payment to each of them of a sum of money equal to the amount which each normally would have earned as wages from October 23, 1944, to the respective dates of their reinstatement in the manner provided in the section of the Intermediate Report entitled "The Remedy";

(c) Give separate written notice to each of its employees who signed an individual contract of employment, as described in the Intermediate Report, or any modification, continuation, extension, or renewal thereof, or any similar form of contract for any period subsequent to the date hereof: (1) that such contract will not in any manner be enforced or attempted to be enforced to forestall collective bargaining or to deter self-organization; (2) that the employee is not required or expected by virtue of such contract to deal with the respondent individually in respect to rates of pay, wages, hours of employment, or other conditions of employment; and (3) that such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract or to any defenses thereto by the employer;

(d) Post at its plant in Port Gibson, Mississippi, copies of the notice attached to the Intermediate Report, marked "Appendix A".[3] Copies of said notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

[3] This notice, however, shall be, and it hereby is, amended by striking from the first paragraph thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu thereof the words, "A Decision and Order".

(e) Notify the Regional Director for the Fifteenth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that the respondent discriminated in regard to the hire and tenure of employment of Charles Marshall, Viola Noble, Canary Jackson, E. M. Howard, and Evan Doss.

Signed at Washington, D. C., this 26 day of August, 1946.

PAUL M. HERZOG,
Chairman,
JOHN M. HOUSTON,
Member,
(Seal) National Labor Relations Board.

MR. GERARD D. REILLY, concurring in part and dissenting in part:

I am constrained to dissent from that portion of the foregoing decision of my colleagues concerning the alleged lock-out of the respondent's employees for refusal to sign the "contract of employment".

It is my opinion that the majority has erred in its interpretation of the decision of the Supreme Court concerning *J. I. Case v. N. L. R. B.*[4] The issue posed by that

[4] 321 U. S. 332.

case was whether or not the terms and conditions of the individual contract should yield to a collective agreement to the extent that they were at variance. The Board held that the collective agreement was controlling and that insistence upon the terms of the individual contracts by the employer by a violation of the Act.

Although my colleagues have found that the contract was "not in derogation of the Act nor did execution of (the) contract preclude future collective bargaining", they have nonetheless found that the requirement that the contracts be signed was violative of the Act. They have further found that the respondent's refusal to permit its employees to continue at work until the requirement was met constituted a violation of the Act. With these conclusions I can not agree.

The majority has rested its ultimate findings upon all of the "circumstances" in the case, including the fact of the Union's organizational campaign and the pendency of a proceeding looking to the designation of a representative by the employees. The Supreme Court in its *J. I. Case* decision specifically considered certain conditions under which individual contracts would not be held violative of the Act. Among these conditions were: expiration of a collective agreement; deadlock of negotiations; non existence of a legally demonstrated majority; and other similar conditions. It is apparent therefore that the timing of the respondent's demand and the pendency of representation proceedings do not suffice to bring this contract and the demand for its signature within areas prescribed by the Act.

It is my opinion that as these contracts were not in themselves violative of the Act, and as the respondent's employees were not, and could not, be required to sign away any of their rights under the Act, the requirement that the contracts be signed was a valid condition of employment. The alleged lock-out by the respondent, when viewed in this light, becomes in effect a strike by the employees involved and they are not entitled to be made whole for any loss of pay they may have suffered as a consequence.

Signed at Washington, D. C., this 26 day of August, 1946.

GERARD D. REILLY,
Member,
National Labor Relations
Board.

APPENDIX B.

In the United States Circuit Court of Appeals for the Fifth Circuit.

National Labor Relations Board, Petitioner and Cross-Respondent,

versus **No. 12195**

Port Gibson Veneer & Box Company, Respondent and Cross-Petitioner.

Petition for Enforcement, and Cross-Petition for Review of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(April 9, 1948.)

Before HUTCHESON, HOLMES, and McCORD, Circuit Judges.

McCORD, Circuit Judge:

This case is here upon petition of the National Labor Relations Board seeking enforcement of an order issued against Port Gibson Veneer and Box Company on August 26, 1946, ordering the Company to cease and desist from certain unfair labor practices, to make whole employees discriminated against, and to post appropriate notices to its employees that their rights under the National Labor Relations Act would not be further violated. 49

Stat. 449, 29 USC, Secs. 151, et seq.; Labor Management Relations Act of 1947, Pub. Law No. 101, 80th Cong., 1st Sess., Chap. 120.

The questions presented are (1) whether there is substantial evidence to support the finding of the Board that the Company has engaged in unfair labor practices within the meaning of Section 8(1) and (3) of the Act; and (2) whether the Board's order is valid and proper.

The Company is a Mississippi corporation residing at Port Gibson, Mississippi, where it is engaged in the manufacture of wooden boxes and containers used to package and ship frozen poultry, fresh fruits, and vegetables. It is admittedly engaged in commerce within the meaning of the Act.

In August, 1944, the International Woodworkers of America, C. I. O., began organizational efforts among the Company's employees. These employees numbered about 300 persons, about 95% of whom were Negroes. In September, 1944, the Union claimed to represent a majority of the employees, and requested the Company to recognize it as the exclusive bargaining representative, and to confer with it at once to formulate a contract covering wages, hours, and working conditions. The Company refused to recognize the Union and contested its majority status. A few days later, Hardy J. Wilson, father of Alex Wilson, President and Manager of the Company, made a speech to the Company employees in which he referred to the unrest in the plant, and warned that

organizational efforts then being made by the Negroes would only alienate the white people against them. This speech was made with apparent authority for the Company, as it was generally known among the employees that Mr. Hardy Wilson was the father of the Company President and Manager; that he had been President of the same plant when it had previously operated as the Southern Package Company, and that he still retained control over the allocation of machinery to the Company.

The week following the Union's request for recognition, the Company asked each of its employees to submit to a physical examination and to fill out and sign an application for employment with the Company. This application form had been used before in 1941, when the Company was first organized, but its use was discontinued during the war because of the rapid turnover of personnel and the scarcity of doctors to examine the employees. When it was first used, all of the employees had signed the application without objection, either because it had no significance to them at the time, or because they could not read the applications and did not know the import of the language used. But when they were requested to sign these forms in October, 1944, while their union was trying to organize and seeking recognition with the Company, most of the employees did object, either because they were advised not to sign by their union officials, or because they mistakenly believed that by signing they would contract away their existing rights as employees, and make futile any further attempts by the union to improve their working conditions. They

objected mainly to those portions of the application form, Paragraph 14, which provided that "if employment is obtained I agree to assume all the risks and dangers incident thereto", and, "the Company shall have the right to dismiss me at any time with or without cause". Later, during the period when the Company was insisting that the employees sign the employment applications and the employees were refusing to do so, it was shown that the Company Superintendent made remarks designed to intimidate and coerce the employees, and to stave off union organization and recognition within the plant." When the employee denied the accusation, the Company Engineer joined the group with the remark, "I know these damn Negroes are trying to get their union in". Later, while the employees were holding a union meeting at a church, the Company's Plant Manager, Wheeless, parked his car near the church and watched the meeting, while the local sheriff who had accompanied him went to the door of the church where he could watch and hear the proceedings. It was shown that this same sheriff had, on previous occasion, gone to a local ball park while a union meeting was in progress and had told the union organizer in the presence of the employees, "If I had my way I would run you out of town".

On October 16, 1944, the Company President summoned to his office two employees from each department to ascertain why the majority of the employees still refused to sign the employment application. Not satisfied with the reasons given for their refusal, he issued an ultimatum to all employees that they would have to sign the

application by the following Monday morning, October 23rd, if they wanted to continue working at the plant. Accordingly, all employees who failed to sign the applications, were met by the foreman at the plant entrance on that date, and refused entrance. Others who had not signed were sent home, and some employees on the afternoon shift who had not signed, learned of the Company's action, and did not report for work. This denial of employment to employees who had refused to sign applications continued for four days, until, on October 26th, the Company President informed the Union's President that the Company would waive the signing of the applications if the employees would return to work. On the following Monday, October 30th, the plant resumed operations with practically a full crew.

On November 22, 1944, the Board conducted an election at the Company plant in which 199 employees voted for the Union and only 19 against it, whereupon the Union was certified to the Company by the Board as representing a *bona fide* majority of the employees, and entitled to recognition as their bargaining representative.

We are of opinion the findings of the Board that the Company has engaged in unfair labor practices within the meaning of Section 8(1) and (3) of the Act, as amended, are supported by substantial, and credible evidence. *N. L. R. B. v. American Furnace Co.*, 158 F. 2d 376, 379; *N. L. R. B. v. Northwestern Mutual Fire Assoc.*, 142 F. 2d 866, 867; *N. L. R. B. v. Greater New York Broadcasting Corp.*, 147 F. 2d 337; *Ft. Wayne Corrugated Paper*

Co. v. N. L. R. B., 111 F. 2d 869, 873; *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 230, 231; *N. L. R. B. v. Austin Co.*, 21 L. R. R. M. 2132.

We further find no merit in the Company's contention that since its employment application was not unlawful, and was admittedly ineffective to preclude future bargaining under the Act, the requirement that the applications be signed could not have interfered with, restrained, or coerced any employees in the exercise of their organizational rights. Employers may not require individual employees to sign employment contracts which, though not unlawful in their terms, are used to deter self organization and forestall collective bargaining, *N. L. R. B. v. Superior Tanning Co.*, 117 F. 2d 881, 890; Cf. *J. I. Case Co. v. N. L. R. B.*, 321 U. S. 332; *N. L. R. B. v. Grower-Shipper Vegetable Assoc.*, 122 F. 2d 368, 377; *Western Cartridge Co. v. N. L. R. B.*, 134 F. 2d 240, 243; *N. L. R. B. v. Bear Brand Hosiery Co.*, 131 F. 2d 731, 732.

These employees possessed little education and many of them could not read or write. Under the circumstances, it was reasonable for them to believe the Company intended to use the employment applications as a deterrent to unionization and to preclude the betterment of their working conditions through collective bargaining. Moreover, a sheriff hostile to their proposed union moved among them as was his right. While both the employment applications and the surveillance of the sheriff were in themselves legal, each constituted a threat designed and so timed as to work a formidable hindrance to the

union organization and certainly warranted the finding of the Board.

By denying employment during the four day lay-off period to those employees who refused to sign the employment applications, the company unlawfully discriminated as to hire and tenure of employment, within the meaning of Section 8(3) and (1) of the Act, *N. L. R. B. v. Cape County Milling Co.*, 140 F. 2d 533, 545; *N. L. R. B. v. Somerset Shoe Co.*, 111 F. 2d 681, 689; *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d 652, 657-658.

We are of opinion the Company was justified in its refusal to grant reinstatement to the three employees, Anna Brown, Alice Carter, and Pearline Brown, who quit work prematurely on Wednesday, October 18th, in protest of the Company's requirement that they sign the employment application by the following Monday. There existed no unlawful coercion of these employees by the Company prior to October 23, 1944, which could have justified their strike prior to that date. Having walked off their jobs prematurely and voluntarily, they thereby lost their status of employees and are consequently not entitled to reinstatement.

With the exception noted, the Board's order is valid and proper, and appropriate for the redress called for by the Act. *J. I. Case Co. v. N. L. R. B.*, 321 U. S. 332, 341-342; *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 437-438; *N. L. R. B. v. Cheney Claif. Lumber Co.*, 327 U. S. 385, 387.

Let the order of the Board, with the Exception noted and the modifications requested, be

ENFORCED.

A True copy:
Teste:

.....
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 127

PORT GIBSON VENEER & BOX COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Solicitor General in brief of respondent in opposition to petition for writ of certiorari in this case relies upon certain circumstances as justifying the decision of the United States Circuit Court of Appeals, Fifth Circuit, in rendering the judgment complained of. We will endeavor to answer the points relied upon.

I

That the requirement on the part of the Petitioner that each employee sign an application discouraged union organization.

The facts are not disputed. As early as 1941 the company had required employees to sign the form of application shown in this case as a condition precedent to employment.

The practice was one of almost uniform course by employer.

The application contained statements of fact in regard to the age, health and other material conditions surrounding the employees enabling the employer to determine the acceptability of the applicant as an employee. For reasons shown in the record and correctly stated in the opinion of the Court, for quite a while the requirement was dispensed with. However, long before any question of union organization arose, to-wit, in July, 1944, the company ordered a supply of the forms for the purpose of reinstating the requirement that such forms be made out and signed by each employee. The United Public Health Service demanded the physical examination called for in the application because the company manufactured food products and the condition of the employees as to health was a most material inquiry. The company did not receive the forms ordered in July until October, 1944, at which time, without any intimation that there would be any objection on the part of the employees to the signature of the application, requested each employee to sign the same. Many of the employees had previously signed such applications and were entirely familiar with the course of business had in respect thereto. The undisputed proof is that the mere fact that there was some union activity among the employees had not the remotest connection with the reinstatement of the requirement on the part of the company. The company found that there was some hesitancy upon the part of employees in signing the form and Mr. Wilson assured the employees at a conference October 16, 1944, that there was nothing wrong with the form, that it was the same thing they had signed before. Whereupon, Mr. Wilson insisted that they think the matter over and would be given until October 23, 1944, to decide whether they would sign the forms or not. At that time, Mr. Wilson did not even know that the hesitancy of the employees to

sign the form was based on the fear that such signing would prevent organization of the union. Mr. Wilson made inquiry as to what occasioned the hesitancy of the employees to sign the form and found out for the first time that someone had put into their minds the idea that the signing of the form would obstruct union organization. Mr. Wilson did not receive this information until after October 23rd. Whereupon, he immediately had a conference with the employees and, according to the undisputed evidence, informed them that he had no objection to their joining the union or any organization they wanted to.

If the employees at the October 16th conference or if the Union officials or anyone else at any time before October 23rd had complained to him that the signing the application forms might prevent organization of the union or forestall collective bargaining or deprive the employees of their rights under the Act, Mr. Wilson would have done before October 23rd just what he did after he learned the real cause of the misunderstanding (R. A. 124-125). It is undisputed and uncontradicted that the company did not know until some time after October 23rd, that the union was responsible for the failure of the employees to execute the form and that at least some of the employees were of the opinion that the company was using it to defeat the union (R. A. 124). On discovering this, Wilson, on October 26, called for the union's officers, whose names he had just learned (R. 1; B. A. 13; R. A. 125, 158), expressed regret at the misunderstanding and made it crystal clear that the company was not opposed to having its employees represented by the union. To relieve them entirely of their fear, Wilson said, they would not thereafter be required to sign the application forms, though the company wanted to get the information called for thereon (R. A. 125). Similar sentiments were expressed by Wilson two days later, October 28, 1944, in a talk to a crowd of

employees who had come for their pay (R. A. 127; R. 72-73), advising that he didn't care whether the employees belonged to the union or to the Masonic Lodge or to any church they might choose (B. A. 17).

Mr. Buie, the union's president, admitted that it was the union organizers who advised the employees not to sign the form and that the company was in ignorance of the fact that such advise was being given (B. A. 5). Mr. Buie (B. A. 16-17) testified as follows:

> Q. Luther, now the Saturday following these dates we have been talking about was pay day, wasn't it?
>
> A. Yes, sir.
>
> Q. And was Mr. Aleck Wilson present over there at the time you were paid off?
>
> A. He was.
>
> Q. And practically all of the employees come there on pay day to get their pay, do they not?
>
> A. They do.
>
> Q. And Mr. Wilson made a talk there on that day which would be the Saturday after the 23rd of October in which he explained to all of the employees that were present that it wouldn't be necessary to sign these application blanks?
>
> A. He said that.
>
> Q. And told them to go on back to work and forget about the application blank?
>
> A. He did.
>
> Q. Did he also made a statement there that so far as he was concerned they could join the Union. He didn't care whether they belonged to the Union or not?
>
> A. He said he wanted them to go back to work, and he says, "It makes no difference whether you are a Methodist, Baptist—several Christian denominations"—or Union; whatever you may be, I want you to come back to work. Will you come back?" And they was slow about speaking. He said—he spoke again. And they says, "Yes, we will be out Monday."

Q. And he told them it didn't make any difference whether they belong to a Union?

A. "It makes no difference if you are a Methodist, Baptist, or Christian or Union, or whatever."

Q. That statement was made?

A. That was the way the statement was made.

Q. To all employees, and that was on a Saturday?

A. On pay Saturday.

The requirement that the forms be signed was dispensed with, and the employees were invited to go back to work. The employees did return to work and no further effort was made to have them sign the forms. These facts are undisputed in this record and we will submit to the Court that they are not susceptible to any inference that the requirement that the forms be signed so far as the company was concerned had the slightest relation to union organization. The United States Circuit Court of Appeals, Fifth Circuit, committed error in drawing an unfavorable inference against the petitioner by reason thereof. The decision of the Circuit Court of Appeals, Fifth Circuit, was contrary to the decision of this Court in the case of *National Labor Relations Board* v. *Columbia Enameling & Stamping Company, Inc.*, 306 U. S. 292, 83 L. Ed. 660. In that case there was a labor dispute in which two government conciliators communicated with the president of the company and asked for a conference to which the president assented. Two days later the president of the company telephoned the conciliators withdrawing the assent. The National Labor Relations Board decided that the company was guilty of unfair labor practices. The facts showed, however, that the president of the company did not know that the conciliators were representing the union and asked for the conference at the request of the union. The National Labor Relations Board held that it might draw the inference that the company's president had such knowledge.

In disapproving the action of the Board and in affirming the action of the Circuit Court of Appeals in refusing to enforce its order, the Court used the following language:

> "Respondent's president testified that on July 23rd the conciliators asked him if he would meet with them and the Scale Committee; that he replied that he would; that no meeting was arranged and that several days later he called one of the conciliators on the telephone and informed him that he, the witness, 'would not have any meeting with him or with the Scale Committee.' All else that took place between the conciliators and respondent is left as a matter of conjecture.
>
> "This testimony, on which the Board relies to support its finding, shows on its face that there was no indication until some time later than July 23rd of any unwillingness on the part of respondent's president to meet the Union. Furthermore, it contains no hint that the Union at any time after July 5th and before September communicated to respondent its willingness to bargain, or that the conciliators, in asking a meeting and discussing the matter with respondent's president, purported to speak for the Union. The testimony is consistent throughout with the inference, and indeed supports it, that the conciliators, so far as known to respondent, appeared in their official role as mediators to compose the longstanding dispute between respondent and its employees; that the employer first consented in advance to attend a meeting, and later withdrew its consent when they had failed for some days to arrange a meeting. Whether in the meantime the Scale Committee or any other representative of the Union was in fact willing to attend a meeting does not appear."

It must be borne in mind that the signing of the application by each employee was an important matter. The application revealed highly important facts to the employer and was necessary to the proper operation of the business. It is conceded that the company had the right to procure the

signature of the employees, and we submit that improper motives would not be justified where the employer is in the exercise of recognized legal right in the absence of the clearest proof.

In the case of *N. L. R. B.* v. *Alco Feed Mills,* 133 Fed. (2d) 420, the Court held that the Board may not ignore or put aside competent, reasonable, uncontradicted and unimpeached testimony of witnesses. The Court said: "These principles, which apply in testing whether the evidence will support a jury verdict, apply to the findings of the Board."

The proof is undisputed that the petitioner had no knowledge or information until October 23rd that the employees, or any of them, were of the opinion that the signing of the application would interfere with Union organization. The proof is equally undisputed that this false impression was given to the employees by Union organizers. Before receiving this information, petitioner did everything a reasonable person could be required to do to inform the employees that the signing of the application was a matter of no importance in respect to the forming of a Union.

II

Denial of employment to the employees refusing to sign the application was not discriminatory.

The contract itself was not illegal and the Board so found. In the case of *J. I. Case Company* v. *National Labor Relations Board,* 321 U. S. 332, 88 L. Ed. 762, it appeared that the employer made individual contracts with each of the employees prior to the recognition of the Union for collective bargaining. The employer insisted that the individual contracts would control. The Supreme Court of the United States very properly held to the contrary, that there was a field within which separate contracts might very

properly be had between the employer and the employee, and there was nothing in the Act to prevent separate contracts between the employer and the employee, but provisions in such contracts, if any, contrary to the National Labor Relations Act, should give way to the contract with the Union as the representative of all of the employees. In other words, any provision in a private contract between an employer and an employee contrary to the trade agreement entered into as the result of collective bargaining with the union would give way to the terms of the trade agreement. There is not the slightest evidence in this case that if each and every employee had signed the application or form that the employer intended that the same should prevail over a trade agreement if any conflict there should be. Not only is it true that the facts as we have stated them are undisputed and not susceptible of any other inference, but the company is entitled to the benefit of the well-established presumption that it acted honorably and in good faith. Good faith is presumed until the contrary is shown. *Flynn & Emrich Co.* v. *Federal Trade Commission,* 52 Fed. (2d) 836; *American Surety Co. of New York* v. *Citizens' Nat. Bank of Roswell,* 294 Fed. 609; *Rookwood Pottery Co.* v. *Commissioner of Internal Revenue,* 45 Fed. (2d) 43; *Planters' Operating Co.* v. *Commissioner of Internal Revenue,* 55 Fed. (2d) 583.

Close examination of the *Case* decision, *supra,* and the facts of this proceeding, we believe, make entirely reasonable the dissenting opinion in the instant matter of Member Reilly of the National Labor Relations Board. We respectfully request that the Court again examine that dissenting opinion, in which Member Reilly said:

> "Although my colleagues have found that the contract was 'not in derogation of the Act nor did execution of (the) contract preclude future collective bargaining,' they have nonetheless found that the require-

ment that the contracts be signed was violative of the Act. They have further found that the respondent's refusal to permit its employees to continue at work until the requirement was met constituted a violation of the Act. With these conclusions I can not agree.

"The majority has rested its ultimate findings upon all of the 'circumstances' in the case, including the fact of the Union's organizational campaign and the pendency of a proceeding looking to the designation of a representative by the employees. The Supreme Court in its J. I. Case decision specifically considered certain conditions under which individual contracts would not be held violative of the Act. Among these conditions were: expiration of a collective agreement; deadlock of negotiations; non-existence of a legally demonstrated majority; and other similar conditions. It is apparent, therefore that the timing of the respondent's demand and the pendency of representation proceedings do not suffice to bring this contract and the demand for its signature within areas prescribed by the Act.

"It is my opinion that as these contracts were not in themselves violative of the Act, and as the respondent's employees were not and could not be required to sign away any of their rights under the Act, the requirement that the contracts be signed was a valid condition of employment. The alleged lockout by the respondent, when viewed in this light, becomes in effect a strke by the employees involved and they are not entitled to be made whole for any loss of pay they may have suffered as a consequence."

It is perfectly clear that even if each and every employee had signed the application as requested such would have in no manner interfered with collective bargaining whenever the Union represented a majority of the employees. The undisputed proof is that it was not the purpose of the petitioner in asking that the applications be signed that the Union organization be interfered with and if the employees mistakenly obtained such impression it was the

fault of the Union officers who so informed such employees. It is conceded in this case that the signing of the applications would in no manner have interfered with collective bargaining and the terms of the applications, if signed, would have yielded to the bargaining agreement. The entire situation was brought about not by the petitioner but by the wrongful and confessedly erroneous statement made by the Union organizers. It is true that the contract provided that the employee agreed to assume the risk and dangers incident to the employment. The State of Mississippi is a common law State and without any contract the employee assumes the risk ordinarily incident to the employment. *Austin* v. *Mobile & O. R. Co.*, 99 So. 3, 134 Miss. 226; *Barron Motor Co.* v. *Bass*, 150 So. 202, 167 Miss. 786; *Crosby* v. *Burge*, 1 So. (2d) 504, 180 Miss. 739. The provision had reference only to injuries arising as an incident to employment and would be included in the contract of employment whether so expressed or not.

It is very true that the form of application is to the effect that the company should have the right to dismiss the employees at any time with or without cause. The evidence discloses without conflict that this clause had a background. The form had been in common use for many years and the provision was intended only to negative any idea that the employee had a contract for permanent employment for any fixed period. If the employees obtained the idea that any provision in the application was intended to discourage union activities it is conceded that the suggestion came from union organizers and if union organizers informed the employees, or any of them, that the signing of the application would obstruct union organization or that there was anything in the application militating against their rights to deal collectively, then such union agent, for the purpose doubtless of creating hostility between the employer and the employees, was guilty of insincerity and such conduct

should not become the basis for the decision of this Court, especially since the company undisputably did not know the employees had been told this or had the erroneous idea. It may be true that many employees refused to sign the application because they were advised by union officials not to do so. If that fact be true, confessedly in this case the union officials concealed from the employer the fact that they were so advising the employees. It is not true, however, at least the evidence does not establish it, that many of the employees refused to sign the application because of the belief that they were signing away their rights. Upon the other hand, the record shows undisputedly that only 10 of the 300 employees were examined by the Board upon that point. Four of the employees, in answer to leading questions, stated that they did so believe. The remaining 6 of them said they did not refuse to sign the contract upon that account. These facts appear from the record itself. Therefore, there were 290 employees who were not examined at all and since these employees were admittedly under the influence of the union and were not called as witnesses, it is presumed that the testimony of such remaining employees would be unfavorable to the theory thought to be established by the union. The non-production of the witnesses under the circumstances creates a presumption that their testimony, if procured, would be unfavorable. *Norguet* v. *Paramount,* 177 Fed. 970; *Givens* v. *Bell,* 263 Fed. 634; *Lincoln National Life Insurance Co.* v. *Erickson,* 42 Fed. 997; *General Electric Co.* v. *Allis Chalmers Co.,* 194 Fed. 414.

It is perfectly obvious that these negro employees, many of them who could not even read, cared nothing about signing the application and notwithstanding the fact that the union organizers, well knowing that the application could in no manner affect their rights as to collective bargain-

ing, secretly and without the knowledge of the employer, advised them not to sign the application.

It is very true that on October 16, 1944, Mr. Wilson, the president, made inquiries as to why the employees were not signing the applications and the real reason why they were not signing the applications was concealed and kept secret. The employees gave no satisfactory reason or no reason at all why the contract should not be signed. The president of the company, upon whose shoulders there rested the responsibility of the proper operation of that plant, told them that they must sign on or before the 23rd or they could not continue to work. It was not until after that date that, for the first time, the president of the company was informed that the reluctance of the employees to sign the contract was due entirely to the secret objections of union agents telling them that their rights as to collective bargaining would be injured thereby which such union agents knew were untrue. Immediately upon receipt of this information Mr. Wilson undisputedly told the employees to join the union, the Masonic Order, or the Methodist Church, or any other organization they wanted to and as soon as he found out that the union agents were falsely using a secret device to keep the employees from signing the application, such signature was dispensed with.

III

Action of the Petitioner in Refusing to Bargain

In September, 1944, the Union claimed to represent a majority of the employees and requested the company to recognize it as exclusive bargaining representative and this the company refused to do. The undisputed proof is, if Your Honors please, that the company questioned the fact that the union represented a majority of the employees, and, as a matter of fact, the undisputed proof is that on and

prior to October 23, 1944, it did not represent a majority of the employees. Of the total of 299 on the pay roll immediately prior to October 23rd, only 128 employees had signed union cards up to October 27, 1944 (R. A. 128-129). Therefore, the company was entirely within its rights in refusing to deal collectively and it was an imposition on the part of the union to insist that the company proceed under the circumstances and no inference of wrong-doing against the company should be inferred therefrom.

The employer is under no obligation to bargain collectively until after a majority of the employees have selected the bargaining representative and such representative requests the employer to bargain collectively. *National Labor Relations Board* v. *West Ky. Coal Co.*, 152 Fed. (2d) 198, cert. den. 328 U. S. 866, 90 L. Ed. 1636.

IV

Remarks Made by H. J. Wilson to Employees

Reference is made to the fact that Mr. H. J. Wilson, the father of the president, made a speech to the company employees and stated that organizational efforts would alienate the white people against them. With great deference, we submit that this finding is in conflict with the report of the examiner. The examiner (R. 83) makes the following finding in respect to the observations of Mr. Wilson:

> "The undersigned does not find in the recorded accounts of H. J. Wilson's speech and of Marshall's reply any substantial evidence upon which to base a finding that Marshall's discharge was for Union membership and activity. Wilson's speech was hortatory in character *with slight and remote reference to Union activities in the plant.* Marshall was unable to recall that Wilson had mentioned the Union." (Italics added.)

While he has no financial interest in the corporation, it may be assumed for the purpose of this case that his remarks were authorized. It must be borne in mind, however, that the right of freedom of speech gives the officers of the corporation, or anyone who may represent them, authority to present their views upon labor policies and problems.

There is nothing in the National Labor Relations Act to prevent an employer from expressing his views upon labor policies or problems. An employer is free to take any side he sees fit. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 86 L. Ed. 348.

An employer may express opinion on the merits of labor organization. *National Labor Relations Board* v. *American Pearl Button Co.*, 149 Fed. (2d) 311.

Where the employer's labor relations manager, prior to election, expressed the policy of the company as being opposed to the closed shop, such was not improper where there was no indication that there would be refusal to negotiate. *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 Fed. (2d) 486.

There is nothing in Mr. Wilson's remarks indicating an unwillingness on the part of the company to negotiate whenever the union represented a majority of the employees.

V

Miscellaneous Circumstances

Emphasis is placed upon the fact that the company superintendent made remarks unfavorable to Union organization. It may have been made before or after October 27th but there is not the slightest indication that such remark as the superintendent made had the slightest influence upon any employee. It is stated that when the employee denied the statement made to the superintendent, the com-

pany engineer referred to the fact that the "damn negroes are trying to get their union in". Suppose the superintendent did make upon one occasion a remark indicating some antagonism to the union. Suppose that the engineer upon one occasion made some remark antagonistic to the union; it is not contended that more than one employee heard it. It was at the utmost a mere casual remark. It must be borne in mind that Mr. Wilson had clearly announced a policy of non-interference with union organization, and such remarks as were made by the superintendent in the presence of one employee out of 300 is too trivial a circumstance upon which to convict the respondent of unfair labor practices. The identical question was before the Circuit Court of Appeals, Eighth Circuit, in *N. L. R. B.* v. *Montgomery Ward,* 157 Fed. 2d 486, and it appeared that several supervisory officers of the company, over a period of fifteen months, had made isolated remarks showing antagonism to union activities for which the National Labor Relations Board convicted the employer. The Circuit Court of Appeals, Eighth Circuit, in refusing to enforce the order, referred to the following language from an earlier decision:

> "In considering these remarks it must be borne in mind that respondent had consistently proclaimed, both by spoken and written words, its fixed policy that employees were free to join or not to join a union and to vote accordingly without fear of reprisals from respondent. * * * When, as here, an employer has clearly defined his attitude of noninterference the expressions of minor supervisory employees to the contrary must be regarded as their individual views—they speak without authority from their employer."

Just because some employee with some authority makes an occasional derogatory statement does not justify the inference that the employer had any ulterior motives.

The Court lays emphasis upon the fact that the plant manager, Wheeless, parked his car near the church and watched a union meeting while the local sheriff who had accompanied him went to the door of the church where he could watch and hear the proceedings. There is not a particle of evidence in this record that the sheriff accompanied Mr. Wheeless. In fact, if the sheriff did go to the door of the church and watch the meeting, this is a matter the company had no control over and neither should it be held responsible for the fact, if it be a fact, that the sheriff went to a local ball park and told the union organizer: "If I had my way I would run you out of town". There is not a particle of evidence that the company or any of its officers or officials knew of the circumstance or had anything to do with it and we submit to Your Honors that the Court is holding the company responsible therefor by using such fact as a circumstance to justify the conviction of the company of unfair practices in this case. It would be perfectly natural that the sheriff of the county would show some oversight of a gathering of several hundred negroes. It is conceded that the sheriff was doing what he had a right to do but we respectfully submit that the company did not have, according to the evidence, the remotest connection with either of the transactions. It is very true that Mr. Wheeless appears to have watched the meeting by parking his car near the church but the evidence does not show that he was close enough to hear anything that was said or that he attempted to use any influence. We assume that it was the presence of the sheriff upon which the Court was laying emphasis and, as we have above stated, if the sheriff was present and was not present with Mr. Wheeless, the sheriff was a public official to perform his duties in his own way and the company should not be held responsible therefor directly or indirectly and the Court should defend the company from any unlawful inferences to be drawn against the company by reason of the sheriff's conduct.

The proof is undisputed that whenever the Union represented a majority of the employees bargaining was had and the company from the very beginning announced as its policy that it had no objection to the employees forming a Union.

We submit that the writ of certiorari applied for should be granted.

Respectfully submitted,

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American Bank Building,
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The printer is instructed to deliver three copies of the foregoing brief to the Solicitor General of the United States, contemporaneously with the filing of briefs with the Clerk of the Supreme Court of the United States.

This, the 14th day of September, 1948.

William H. Watkins,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 127

PORT GIBSON VENEER & BOX COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 132–137) is reported in 167 F. 2d 144. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 50–55, 62–100) are reported in 70 N. L. R. B. 319.

JURISDICTION

The decree of the court below (R. 162–168) was entered on June 1, 1948, following the court's denial on May 20, 1948, of the Company's peti-

tion for rehearing (R. 138–162). The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U. S. C. 1254), and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, the Board properly found that the Company interfered with, restrained, and coerced its employees, in violation of Section 8 (1) of the Act, by demanding that they sign individual contracts of employment at a time when a labor organization was claiming to be their exclusive representative and was taking steps to prove its majority status.

2. Whether the Board properly determined that the Company's denial of employment to those employees who refused to sign individual contracts of employment constituted discrimination against them within the meaning of Section 8 (3) of the Act where the Company's demand that such contracts be signed was for the purpose and had the effect of deterring the employees' organizational efforts.

Another question stated by the Company but which we believe is not presented by the record in this case is:

3. Whether a Board order requiring the Company to cease and desist from engaging in conduct

which was violative of the Act when committed but which is not unlawful under the Act as amended, may now be enforced.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 19–21.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on August 26, 1946, issued its findings of fact, conclusions of law, and order (R. 50–100). The pertinent facts, as found by the Board, may be summarized as follows:

The Company is engaged in the manufacture of wooden boxes and containers used in the shipment of frozen poultry and fresh fruits and vegetables (R. 62, 65; B. A. 2–3, 96). It employs about 300 persons, about 95 percent of whom are Negroes (R. 64; B. A. 91, 97, 99).

During August 1944, the International Woodworkers of America, CIO, herein called the Union, began organizational efforts among the Company's employees (R. 63; B. A. 4, 7–8). On September 25, 1944, it notified the Company that it represented a majority of the employees

and requested a bargaining conference (R. 65–66; B. A. 75). The Company replied on September 30, that it doubted the Union's majority status and requested proof of such status (R. 64; B. A. 75–76). The Union thereupon filed a petition with the Board, requesting the Board to determine the question concerning representation (R. 64; B. A. 76). At an election conducted by the Board on November 22, 1944, 199 of the employees voted for and 19 against the Union. (R. 64; B. A. 17, 76, 120).

A few days after the Union's request for recognition, the Company required its employees to assemble and listen to a speech by Hardy J. Wilson, who was the father of the Company's president and manager and who had control over the allocation of machinery to the Company (R. 63, 80; B. A. 31, 73, 88–89, 100; R. A. 112). Hardy told the employees, *inter alia,* that because of the unrest in the plant, he was contemplating a change in the allocation of two machines, which he had available, from the Port Gibson plant to another plant (R. 81; B. A. 31, 38, 73, 87). He also warned the employees that their organizational efforts could only alienate the white people against them (R. 81; B. A. 31).

Two days later, on October 2, the Company asked each of its employees to submit to a physical examination and to fill out and sign an application for employment (R. 66; B. A. 7, 11, 102,

110–114). Paragraph 14 of the application set forth some conditions of employment and purported to make the application a part of the employee's "contract of employment" (R. 65–66; B. A. 111–112). This application form had been used before, in 1941, when the Company was first organized, but its use had been discontinued during the latter part of 1941 because of the rapid turn-over of personnel and the scarcity of doctors available to examine the employees (R. 64, 66; B. A. 34–35, 89–90). When it was first used, all the employees had signed the application without objection, either because it had no significance to them at the time or because they could not read the applications and did not understand the import of some of its terms (R. 66; B. A. 35, 39, 52, 67, 70, 90).

When they were requested to sign the applications in October 1944, however, most of them did object (R. 66; B. A. 92–93). During the three weeks following October 2, only 45 of the approximately 300 production employees signed (R. 66; B. A. 92). None of the employees objected to giving the information requested in the application form or to submitting to a physical examination (R. 67, 69–70; B. A. 92). They objected only to Paragraph 14 which purported to set forth terms and conditions of individual contracts of employment (R. 67, 69–70; B. A. 10–11, 16, 22, 26, 37, 50–51, 65–66, 93). They objected prin-

cipally to those portions of Paragraph 14 which provided that "if employment is obtained I agree to assume all the risks and dangers incident thereto" and that "the Company shall have the right to dismiss me at any time with or without cause" (R. 69–70; B. A. 10–11, 16, 22, 26, 48, 50, 62, 65).

By signing the application forms and thereby agreeing to the conditions of employment referred to in Paragraph 14, many of the employees believed that they would be signing away their existing rights and making futile any further attempts by the Union to improve their working conditions (R. 51, n. 2, 69–71; B. A. 22, 26, 37, 53, 66). The Union organizers also, when asked by some of the employees for advice in regard to signing, advanced the opinion that Paragraph 14 seemed to take all rights away from the employees and was designed "to bust up the Union" (R. 69–70; B. A. 5, 8–9).

The Company, by certain coercive antiunion statements and conduct, encouraged the employees in their belief that the Company's purpose in requesting their signatures on the application forms was to prevent the Union from organizing the plant. Superintendent Gallman told employee Eddie Thomas that "The way things [are] going around here, you boys are going to be out of jobs in about six months" (R. 78; B. A. 32). Thomas understood that Gallman was referring

to the Union's organizing campaign and queried him as to whether there was any way to prevent "the Union coming in" (R. 79; B. A. 32). Superintendent Gallman replied that it could be prevented by "Getting up these people to sign those papers," the application forms (R. 79; B. A. 72). Upon another occasion, Superintendent Gallman approached several of the employees while they were working and accused one of them of "trying to get a dam Union in the plant" (R. 79; B. A. 19). The employee denied knowing anything about the Union; whereupon the Company's engineer joined the group with the remark, "I know these damn Negroes are trying to get their Union in" (*ibid.*).

Later, while the employees were holding a union meeting at a church, the Company's plant manager, Wheeless, parked his car across the street from the church and watched the meeting (R. 79; B. A. 19–20, 21–22). The local sheriff, who had accompanied Wheeless, went to the door of the church where he could see and hear the proceedings (R. 79; B. A. 22). This same sheriff had, on a previous occasion, gone to a local ball park while a union meeting was in progress and had told the union organizer in the presence of the employees, "If I had my way I would run you out of town" (R. 79; B. A. 4–5).

When, by October 16, very few of the employees had signed the application forms which

the Company had requested them to sign, President Alex Wilson summoned to his office two employees from each department to question them concerning the employees' reluctance to sign (R. 67–68; B. A. 65, 92–93). He learned from these employees that because of the inclusion of Paragraph 14, especially those parts referring to their assumption of all risks and the company's right to discharge them with or without cause, they believed that "If they signed that, they signed away all their rights" (R. 67–68; B. A. 65, 93). Wilson then stated to them that the contract was not illegal, that anyone who wanted to take over the mill and run it was free to do so, but that so long as he was running it, it would run according to his rules (R. 67–68; B. A. 65–66). He issued an ultimatum to these and to other employees in the plant that no one who had failed to sign an application form by October 23 would be permitted to continue working (R. 67–68; B. A. 65–66).

The Board found that the provisions of the contract of employment contained in the application forms "were not in derogation of the Act, nor did execution of such a contract preclude future collective bargaining" (R. 51). It found, however, that in view of the timing of the Company's demand to coincide with the Union's organizational campaign and the representation proceedings before the Board and in view of the

Company's resistance to the Union in the manner set forth above, the Company's demand that employees sign the individual contracts was "for the purpose of deterring employees from joining or adhering to the Union, and that the demand had such effect upon the employees" (R. 52). It found "that the employees reasonably believed, although mistakenly, that execution of such contracts would have the effect of precluding future collective bargaining" (R. 51, n. 2).

On October 23, at 8 a. m., when the day shift employees reported for work, the foremen met them at the plant entrance and refused admittance to all who had not signed the forms (R. 68–69; B. A. 11–12, 30, 62–63). The few employees who were in the plant earlier and who had not signed were sent home (R. 69; B. A. 60). Some of the employees on the afternoon shift who had not signed learned of the Company's action and did not report for work (R. 69, n. 9; B. A. 72).

This denial of employment to employees who had refused to sign the forms continued for four days. On October 26, the Company's president informed the Union's president that the Company had decided to waive the requirement that the forms be signed and requested him to notify the employees to return to work on the following day, Friday, October 27 (R. 71; B. A. 12–14, 94–95). Because of a superstition that it would

be unlucky to return to work on Friday or for various other personal reasons, most of the employees did not report for work until the following Monday, October 30 (R. 71–73; B. A. 14–17, 19, 40, 95, 98).

Upon the basis of these facts, the Board found that the Company, by making coercive anti-union statements to its employees, by engaging in surveillance of one of their union meetings, and by requesting them to sign individual contracts of employment at a time when the Union was claiming to be their exclusive representative and was taking steps to prove its majority status, interfered with, restrained, and coerced its employees in their rights guaranteed by the Act, in violation of Section 8 (1) of the Act (R. 50–52, 64–73, 78–81). The Board further found that the Company, by denying employment for four days to all employees who refused to sign the individual contracts, had discriminated against its employees to discourage their union membership, in violation of Section 8 (3) and (1) of the Act (R. 52, 64–75). The Board also found that the Company had discriminatorily denied employment to three of its employees who walked off their jobs prior to the dead line set by the Company in protest against the demand that they sign and who were not reinstated when they reported for work subsequent to the Company's waiver of its requirement (R. 75–78; B. A. 24–26, 42–48, 80–82).

The Board ordered the Company to cease and desist from its unfair labor practices, to make whole the employees discriminated against, to give separate appropriate written notices to each of its employees whom it had required to sign the individual contracts, and to post appropriate notices (R. 52–55). Board Member Reilly dissented from that part of the Board's decision which held that the Company's requirement that its employees sign the individual contracts violated Section 8 (1) and (3) of the Act (R. 55–57).

On December 11, 1947, the Board filed in the court below a petition for enforcement of its order (R. 1–14). On April 9, 1948, the court below entered its opinion (R. 132–137) and on June 1, 1948, its decree (R. 162–168), enforcing the Board's order except insofar as it affected the three employees who walked off their jobs prior to the deadline for signing the application forms.

ARGUMENT

1. The Company contends that since the contractual terms embodied in the application forms were not in themselves violative of the Act and since the Company requested the execution of such forms at a time when the Union had not yet been certified as the employees' bargaining representative, the Company's use of the forms to deter the employees' organizational activities was not unlawful (Pet. 10–11, 19–20). In arguing thus,

the Company relies heavily upon language in *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 336–337, wherein this Court enumerated some circumstances in which individually bargained contracts may lawfully be used. But nothing in that decision is inconsistent with the ruling of the court below in this case. This case involved no individually bargained contracts but only contracts which the Company attempted to coerce its employees into signing as a part of its campaign to keep the employees from joining the Union.

In the *J. I. Case* decision, involving individual contracts voluntarily executed by the employees which contained no provisions in themselves unlawful, this Court upheld the right of the Board to enjoin the employer from utilizing such contracts "to forestall collective bargaining or deter self-organization" (321 U. S., at 341). The Court recognized in the *J. I. Case* decision, as is true in this case, that such prohibition does not prevent the employer "from contracting with individual employees under circumstances which negative any intent to interfere with the employees' rights under the Act" (321 U. S., at 340–341).

The question in this case is not, as the Company contends (Pet. 19), whether it is permissible for an employer to enter into individual contracts with its employees at a time when a

majority of its employees have not authorized a union to represent them. The question, rather, is whether an employer may demand that its employees execute such individual contracts under such circumstances as to lead them reasonably to believe that it intends to use the contracts as a deterrent to unionization and to preclude the betterment of their working conditions through collective bargaining. In deciding this question in the negative (R. 135–136), the court below ruled in accordance with principles heretofore pronounced by this and other courts.[1] There can thus be no doubt as to the correctness of the rule applied by the Board and the court

[1] See *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 341; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 359–360; *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. 2d 881, 890 (C. C. A. 7), certiorari denied, 313 U. S. 559; *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. 2d 589, 592 (C. C. A. 7); *National Labor Relations Board* v. *Vincennes Steel Corp.*, 117 F. 2d 169, 172–173 (C. C. A. 7); *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 243 (C. C. A. 7), certiorari denied, 320 U. S. 746; *National Labor Relations Board* v. *Bear Brand Hosiery Co.*, 131 F. 2d 731, 732 (C. C. A. 7); *National Labor Relations Board* v. *Adel Clay Products Co.*, 134 F. 2d 342, 345 (C. C. A. 8); *National Labor Relations Board* v. *Grower-Shipper Vegetable Association*, 122 F. 2d 368, 377 (C. C. A. 9). There are no decisions to the contrary. None of the cases cited by the Company on page 11 of its petition conflicts with or is in any way inconsistent with the decision of the court below, and the Company does not state in what respect it contends that there is a conflict.

below. And the facts outlined in the statement (pp. 3–8, *supra*) demonstrate that the Board was not unreasonable in finding that presentation of the contracts to the individual employees during the course of the Union's organizing campaign, and in the light of other anti-Union acts of the Company, make the rule properly applicable. The factual question would not in any event warrant review by this Court.

2. The Company asserts that the court below erred in upholding the Board's back-pay award to those employees who were denied employment for four days because of their refusal to sign the application forms (Pet. 10, 15–18). In support of this assertion, the Company contends (Pet. 10, 15–18) that the employees, by refusing to sign the application forms as a condition of their continued employment, engaged in a strike. This contention was properly rejected by the court below, for the evidentiary facts, *supra,* p. 9, plainly show that the employees did not engage in a strike but that they were denied employment when they reported for work on October 23, 1944. Since the Company denied them employment because they had refused to comply with a requirement imposed by the Company for the purpose of deterring their organizational activities and precluding the betterment of their working conditions through collective bargaining, the Company's conduct constituted discrimination against

them to discourage membership in a labor organization, in violation of Section 8 (3) of the Act. In analogous situations the courts have uniformly upheld the Board's power to remedy such unfair labor practices with back-pay awards. See *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. 2d 61, 68 (C. C. A. 2), affirmed, 309 U. S. 629; *National Labor Relations Board* v. *Poultrymen's Service Corp.*, 138 F. 2d 204, 210 (C. C. A. 3); *National Labor Relations Board* v. *Tidewater Express Lines*, 90 F. 2d 301, 302 (C. C. A. 4), enforcing 2 N. L. R. B. 560; *Waterman S. S. Corp.* v. *National Labor Relations Board*, 119 F. 2d 760, 763 (C. C. A. 5); *National Labor Relations Board* v. *Bear Brand Hosiery Co.*, 131 F. 2d 731, 732 (C. C. A. 7); *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. 2d 903, 914 (C. C. A. 8); *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652, 658 (C. C. A. 9).

Nor does the fact that some of the employees who refused to sign the application forms were not union members render non-discriminatory the Company's conduct in excluding all those who refused to sign, as the Company contends (Pet. 16). The situation is analogous to that of the employer who shuts down his plant or a department because some of his employees therein have joined a union. In each case the employer dis-

criminates against all employees included in the shutdown or exclusion from work by treating them differently than it would have treated them if some of them had not joined a union. See *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 238 (C. C. A. 8), certiorari denied June 14, 1948; *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681, 689 (C. C. A. 1); *National Labor Relations Board* v. *Cape County Milling Co.*, 140 F. 2d 543, 545 (C. C. A. 8); *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652, 657–658 (C. C. A. 9).

3. Another question urged by the Company, but which we do not believe is presented in this case, is whether a Board order enjoining conduct which was unlawful under the National Labor Relations Act prior to its amendment on June 23, 1947, but which is lawful under Section 8 (c) of the Act, as amended, may operate to enjoin future conduct of the same or similar nature (Pet. 9, 11–12, 21–22). The Board does not contend that such an order should be enforced. It contends only that such an order is not involved in this case.

The conduct which the Company claims was privileged but which the Board found interfered with, restrained, and coerced the employees in the exercise of their rights guaranteed under the Act, in violation of Section 8 (1) of the Act,

consisted of a speech by the father of the Company's president in which, *inter alia,* he warned the employees that by organizing they would alienate the white people against them and in which he threatened not to allocate two machines to the Company's plant because of the unrest prevalent there; a warning by the Company's superintendent that the employees would be out of jobs in about six months unless they got rid of the Union by signing the application forms; the superintendent's singling out of another employee and accusing him of "trying to get a damn union in the plant"; and the surveillance of a union meeting by the Company's plant manager in the company of a local sheriff who had theretofore publicly announced that if he had his way, he would run the union organizer out of town (*supra,* pp. 4, 6–7). Manifestly, none of these statements or acts fall within the constitutional protection of free speech as expressed by this Court in *National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469, 477, or as expressed in Section 8 (c) of the amended Act, which provides that "The expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit."

CONCLUSION

The decision of the court below, insofar as it sustained the Board's findings and order, is correct and presents neither a conflict of decisions nor any new or novel questions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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AUGUST 1948.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are as follows:

> SEC. 101. The National Labor Relations Act is hereby amended to read as follows:
>
> * * * * *
>
> "SEC. 8 (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.
>
> * * * * *

"SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the rec-

ord considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

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